APPEAL NO. 031800
FILED AUGUST 26, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on June 3, 2003. The hearing officer resolved the disputed issues by deciding that the respondent's (claimant) compensable injury does not extend to a herniated disc at T9-T10[1] and that the claimant had disability from October 5, 2001, to June 27, 2002, and September 12, 2002, through the date of the CCH. The appellant (carrier) appealed, arguing that the determinations are against the great weight and preponderance of the evidence. The appeal file does not contain a response from the claimant.

DECISION

Affirmed as reformed.

The parties stipulated that the carrier has accepted an injury of _____. In its appeal the carrier argues that stipulation E of the decision and order is inaccurate to the extent that it indicates the carrier agreed to limit recoupment to 25% of the weekly income benefit. We agree. A review of the record reflects that the parties agreed that the claimant was overpaid benefits for the period of June 28 through September 11, 2002, when he was earning more than 80% of his pre-injury average weekly wage and that the claimant was paid benefits from the date of injury to January 29, 2002, and disability for that period is not in dispute. We reform stipulation E to read: the claimant was overpaid benefits for the period of June 28 through September 11, 2002, when he was earning more than 80% of his pre-injury average weekly wage.

The claimant testified that he returned to work in a less physically demanding job for a different employer on June 28, 2002, and continued working until September 11, 2002, when the manager let him go because he saw that the claimant was always in pain. The carrier argues that no medical evidence supports the occurrence of the thoracic herniation as a result of the injury and the great weight and preponderance of the objective medical evidence shows that the thoracic spine was essentially normal until after the claimant returned to work for a different employer on June 28, 2002. The claimant had a thoracic discectomy and fusion on December 31, 2002.

The hearing officer did not err in determining that the claimant's compensable injury of _____, includes a herniated disc at T9-T10. That issue presented a question of fact for the hearing officer to resolve. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the trier of fact, the hearing officer resolves the conflicts and inconsistencies in the evidence and decides what facts the evidence has established. Texas Employers Ins. Ass'n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). Nothing in our review of the

[1] We reform the Decision and Order by replacing every reference to the disc herniation to read T9-10 rather than LT9-LT10.

record reveals that the challenged determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to reverse that determination on appeal. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

Further, the carrier argues that the hearing officer committed legal error by holding the carrier to a burden of proving that the claimant suffered an intervening injury. We disagree. In the instant case, the hearing officer found that the disc herniation at T9-T10 is a direct and natural progression of the thoracic injury the claimant suffered while working for employer and that the compensable injury is a producing cause of the disc hernation of T9-T10. In so doing, the hearing officer accepted the claimant's testimony and considered the medical evidence. The burden is on the claimant to prove that an injury occurred within the course and scope of employment. Service Lloyds Insurance Co. v. Martin, 855 S.W.2d 816 (Tex. App.-Dallas 1993, no writ); Texas Employers Insurance Association v. Page, 553 S.W.2d 98 (Tex. 1977). A claimant's testimony alone may establish that an injury has occurred, and disability has resulted from it. Houston Independent School District v. Harrison, 744 S.W.2d 298, 299 (Tex. App.-Houston [1st Dist.] 1987, no writ). The hearing officer, as trier of fact, may employ logic and common sense to cases of delayed manifestation, taking into account the nature of the injury, the area of the undisputed injuries, and the anatomical relationship of the undisputed body areas to the later-diagnosed injuries. Furthermore, a carrier that wishes to assert that a preexisting or subsequent condition is the sole cause of an incapacity has the burden of proving this. Page, *supra*; Texas Workers' Compensation Commission Appeal No. 92068, decided April 6, 1992. This burden cannot be circumvented by casting the issue as an "extent of injury" issue in which a claimant must prove up the relationship of every incremental diagnosis of what is essentially the single injury. We cannot agree that the hearing officer's determinations are against the great weight and preponderance of the evidence. The hearing officer's findings of fact are supported by sufficient evidence.

The carrier argues that the hearing officer erred by finding that the claimant had disability either beyond January 29, 2002, or up to the date of the CCH. Disability is defined as the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Whether disability existed for any period was a question of fact for the hearing officer to resolve. The hearing officer was persuaded that the claimant sustained his burden of proof on the disability issue. The hearing officer was acting within his province as the fact finder in so finding. Nothing in our review of the record demonstrates that the challenged determination is so against the great weight of the evidence as to be clearly wrong or manifestly unjust; therefore, no sound basis exists for us to reverse the disability determination on appeal. Pool, supra; Cain, supra.

We affirm the decision and order of the hearing officer as reformed.

The true corporate name of the insurance carrier is **CLARENDON NATIONAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

UNITED STATES CORPORATION COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Judy L. S. Barnes
Appeals Judge

_____
Veronica Lopez-Ruberto
Appeals Judge